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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 822

THE MARTIN BROTHERS BOX COMPANY, a corporation,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and SOUTHERN PACIFIC COMPANY, a corporation,
Respondents.

Brief of Respondent Southern Pacific Company In Opposition to Petition for Writ of Certiorari

JAMES C. DEZENDORF
GEORGE B. CAMPBELL
800 Pacific Building
Portland 4, Oregon

JAMES E. LYONS
CHARLES W. BURKETT, JR.
65 Market Street
San Francisco 5, California

Counsel for Respondent, Southern Pacific Company.

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

INDEX

	Page
Statement	1
Reply to "Question Presented"	2
Real Question for Decision	6
Summary of Reasons for Denying Writ	6
Argument	7
I. There are no special or important reasons for certiorari	7
II. The complaint before the District Court was properly heard and determined by a single judge, with the acquiescence of petitioner	8
III. Petitioner has no standing to attack jurisdicton of Court of Appeals or District Court	11
Conclusion	12

AUTHORITIES CITED

Cases	Pages
Davis v. Wakelee, 156 U. S. 680	7
Federal Reserve Bank v. Omaha N. Bank, 45 F.2d 511	8
Gore v. Bingaman, 20 C.2d 118, 124 P.2d 17	8
Layne etc. Corp. v. Western Well Works, Inc., 261 U. S. 387	7
Le Tulle v. Scofield, 308 U. S. 415	12
Martin Bros. Box Co. v. Interstate Commerce Commn., 350 U. S. 823, 350 U. S. 909	2, 7
Morley Constr. Co. v. Maryland Cas. Co., 300 U. S. 185	12
Peoria & P. U. Ry. v. United States, 263 U. S. 528	12
Thompson v. Maxwell etc. Co., 168 U. S. 451	8
United States v. Ellison, 74 F.2d 864	11
United States v. Interstate Commerce Commn., 337 U. S. 426	9, 10
Washington Bridge Co. v. Stewart, 44 U. S. (3 How.) *413	8

Statutes	
28 U. S. C.:	
Section 1253	9
Section 1291	8
Section 1336	9, 11
Section 2323	9, 12
Section 2325	9

Texts	
3 Am. Jur., Appeal & Error §§ 865-66, pp. 402-03	12
21 C. J. S., Courts § 109, p. 166	11

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Brief of Respondent Southern Pacific Company In Opposition to Petition for Writ of Certiorari

STATEMENT

This is the third time that this case has been pressed upon this overburdened Court by the petitioner, Martin Brothers Box Company: (1) In No. 85, Oct. Term, 1955, petitioner sought a writ of certiorari to review the decision of the Court of Appeals, 219 F.2d 811, which reversed the single-judge judgment of the Oregon District Court, 128 F. Supp. 919, holding that the trial court erroneously concluded that the evidence was insufficient to sustain the findings and conclusions of the Interstate Commerce Commis-

sion in 280 I.C.C. 395. That petition was denied by the Supreme Court on October 10, 1955 (350 U.S. 823). (2) Petitioner on November 3, 1955, filed in this Court a motion to set aside the order of October 10, 1955, denying writ of certiorari, and contemporaneously filed with the Court of Appeals for the Ninth Circuit a motion to vacate and set aside the opinion and order entered by that court on January 10, 1955, and to dismiss the appeal. Both of these motions were based upon the contention—here renewed—that this was a statutory three-judge case in the District Court, mistakenly heard and decided by a single judge, and, therefore, the Court of Appeals lacked jurisdiction under 28 U.S.C. § 1253, providing for direct appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any act of Congress to be heard or determined by a district court of three judges. This Court denied the motion by order of December 5, 1955; and the Court of Appeals, after hearing the parties on oral argument and considering written points and authorities, entered an order (without opinion) on January 12, 1956, denying the motion to dismiss the appeal (Appendix to Petition, p. 29a). (3) The presentation of the instant petition for certiorari to review the latest order of the Court of Appeals makes the third time this case has been pressed upon this honorable Court.

REPLY TO "QUESTION PRESENTED"

We cannot accept petitioner's "Question Presented," as set forth on page 2 of the petition, and accordingly set forth our own presentation thereof.

Petitioner unqualifiedly states that the decision and judgment of the District Court was one "to enjoin and set aside an order of the Interstate Commerce Commission, which order was made by the District Court for other than the payment of money or the collection of fines." This statement is erroneous, for the proceedings before the Commission, the District Court, the Court of Appeals, and previously before the Supreme Court on the first petition for certiorari in this case, concerned the order of the Commission which denied petitioner an award of reparation. While it is true that petitioner's complaint to the Commission initially sought relief in addition to money damages, petitioner later abandoned all aspects of its complaint other than that relating to money damages for transactions occurring during period January 1 to September 30, 1947. When the case came on for hearing before the Commission, the presiding examiner stated the issue as relating solely to reparation during the stated period (R., pp. 130-31).[1] This statement of the issues was then accepted by the parties as those to be determined, and the examiner's proposed report consequently made no mention of future relief (R., p. 84). No exceptions were filed by petitioner to this omission. Therefore, the report of the Commission concerned itself only with the issue of damages raised by the complaint and stated the relief sought in the following language: "An award of reparation is sought" (R., p. 108).

In its amended petition in the District Court, petitioner summarized in paragraphs 6 to 10 the proceedings before the Commission, and with respect to the examiner's proposed report stated:

---

1. All references marked "R." are to the Transcript of Record filed with petitioner's prior Petition No. 85, Oct. Term, 1955.

"• • • To this report the petitioner filed with the Commission 2 exceptions contending that the amount of reparation to which petitioner was entitled should be found to be at least $205,606.94, and otherwise accepting the said report proposed by the Examiner in full." (R., p. 10)

In its brief before the Court of Appeals petitioner gave its explanation at page 5 thereof for its abandonment of the issues in the complaint before the Commission, other than those relating to money damages, in the following language:

"• • • By the time the matter came on to be heard before an Examiner Martin's Oakland plant was no longer being deprived of necessary cars by Southern Pacific. There remained the question of reparations for the damages caused during the complaint period, from January 1, 1947, to September 30, 1947, by the failure of Southern Pacific Company to furnish adequate transportation."

At page 26 of the transcript of September 7, 1954, oral argument before the Court of Appeals, counsel for petitioner conceded, indeed even urged, the following delineation of what was involved in the appeal:

"Mr. Rand: I think the record shows the only matter before the examiner for hearing at the time that the hearing was conducted in 1950 was the question of reparations and the examiner's statement of issue made at the commencement of the hearing is in the record and was accepted by all parties as the issues then to be determined at that hearing."

So that there might not be any misunderstanding of the scope of the hearing, counsel for petitioner made this concession four times. The following quotations are from page 27 of the oral argument transcript:

"Mr. Rand: Well, as I say, the only issue before the—the only issue that remained after the filing of the petition and after the filing of the answer and to the time of the hearing before the examiner was the question of the damages for the period up to the first day of October, 1947. * * *

"Judge Healy: I think the Court fully understands the only period involved here is the nine-months period prior to filing the petition.

"Mr. Rand: That's right. * * *

"Mr. Rand: There is no—there is no issue, if Your Honor please, as to any—in this case or there wasn't before the Commission, the examiner—the Commission, or the district court, and there isn't before this Court any issue as to any necessity for action on the part of the Commission to compel the Southern Pacific Company to furnish transportation to the Martin Brothers Box Company at the Oakland plant. That issue which was a part of the petition before the Commission is out of the case. I don't know whether that is an adequate explanation of Your Honor's question or not but at least that's the position of the parties at the present time."

It would be difficult to make the issue any clearer; and the District Court, in reviewing the order of the Commission, rightly restricted itself to the reparations issue. (R., pp. 42-43.) The Court of Appeals, at petitioner's insistence, similarly restricted its consideration to the sole issue of money damages. (Record before this Court, Vol. IV, p. 848; 219 F.2d 811). Notwithstanding these indisputable facts and representations, petitioner is now attempting—without even an explanation—to belatedly shift its position by misstating to this Court the nature of the issue finally presented to the Commission and considered by the two courts below.

The various grounds asserted before this Court by petitioner on the motion to vacate the previous denial of certio-

rari in No. 85 Oct. Term, 1955, are indistinguishable from the objections raised by petitioner in the instant petition, and call for similar disposition.

THE REAL QUESTION FOR DECISION

The principal question presented for decision, correctly stated, is as follows: Do the provisions of 28 U.S.C. § 1291 authorize the courts of appeal to review the final decision of the single-judge District Court in this action? A secondary procedural question incidentally arises, and it is: May petitioner raise the jurisdictional question under the circumstances?

We shall undertake to show that the answers to these inquiries are yes and no, respectively, and that no sound reasons exist for granting the writ.

SUMMARY OF REASONS FOR DENYING THE WRIT

1. A review on writ of certiorari is not a matter of right and will be granted only where there are special and important reasons therefor. Rule 18, Sup. Ct. Rules. No such reasons have been shown. Prior rulings of Supreme Court govern instant petition.

2. The complaint was properly heard and determined in the District Court by a single judge, and with the acquiescence of petitioner.

3. Petitioner, not being an appellant, and raising no question as to the jurisdiction of the District Court or Court of Appeals until after denial by this Court of its first petition in No. 85, Oct. Term, 1955, has no standing to attack the jurisdiction of the Court of Appeals, and thus directly or indirectly challenge the propriety of the single-judge decision of the District Court which it seeks to sustain.

ARGUMENT

I. There are no special or important reasons for certiorari.

Jurisdiction to grant certiorari is not conferred upon the Supreme Court merely to get the defeated party in the Court of Appeals another hearing. It is granted, first, to secure uniformity of decision between those courts in the ten circuits and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by the court of last resort. *Layne etc. Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). No good reason has been shown why petitioner herein should have two opportunities to present to this busy Court the same question in the same case. Rule 19 of the Supreme Court Rules of Practice expressly states that a review on certiorari "will be granted only where there are special and important reasons therefor." No such reasons have been shown.

Furthermore, a showing of good cause may not be predicated upon an inconsistent position, such as that adopted by petitioner herein. See *Davis v. Wakelee*, 156 U.S. 680 (1895), where, at page 689, it was stated by this Court:

> "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

Petitioner is bound by the previous rulings of this Court, on both the denial of its first petition, and the motion made to vacate the denial thereof for want of jurisdiction of the Court of Appeals (350 U.S. 909). This Court will not reconsider the same question on a second appeal by the same party. This is so, even though it be contended that absence of jurisdiction of the trial court and Court of Appeals ren-

ders the decision on the first petition nugatory and ineffective as a determination. See *Washington Bridge Co. v. Stewart*, 44 U.S. (3 How.) *413, *417 (1845); *Thompson v. Maxwell etc. Co.*, 168 U.S. 451, 456 (1897); *Federal Reserve Bank v. Omaha N. Bank*, 45 F.2d 511, 514 (8th Cir. 1930), and cases cited; and *Gore v. Bingaman*, 20 C.2d 118, 121 (1942), 124 P.2d 17, 19.

II. The complaint before the District Court was properly heard and determined by a single judge, with the acquiescence of petitioner.

In the foregoing "Statement" we pointed out that by the time the case came before the Commission examiner for hearing petitioner abandoned all aspects of its case other than those relating to money damages for transactions taking place during the 9-month period from January to September, 1947, and on page 4 we quoted the statement of counsel to the effect that by the time the matter came on for hearing the car shortage was over. At that time, the question of reparations or damages during the period covered by the limited complaint was the only thing that remained for consideration and decision. It is, therefore, obvious and inescapable that what was heard by the Commission involved only issues respecting money damages, a characterization of petitioner's case which petitioner itself urged at each step in the progress of the case through the courts until after the adverse ruling of this Court on its petition for certiorari in No. 85, Oct. Term, 1955. Then, for the first time, it urged that the Court of Appeals had no jurisdiction.

28 U.S.C. § 1291 (1948 ed.) provides that the courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States except where a direct review may be had in the Supreme Court. Direct

appeals to the Supreme Court in cases of this character are expressly limited by section 1253 of the same title to appeals from orders granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding "required by any Act of Congress to be heard and determined by a district court of three judges." The trial of this case before the District Court was not required to be heard and determined by a court of three judges. 28 U.S.C. § 1336 vests general jurisdiction in the district courts "of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission." This section vested the trial court with general jurisdiction. It is true that section 2325 of the same title provides that an interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Commission "shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title," but this honorable Court specifically held in *United States v. Interstate Commerce Commn.*, 337 U.S. 426, 443 (1949), that an order of the Commission denying reparations is not of sufficient importance to justify the use of the three-judge court procedure, and that the trial of such a case should be conducted before a single judge. In the complaint there filed during World War II (Apr. 15, 1944) by the United States, the Commission was asked to require the defendants either to perform for the future the handling incident to shipside receipt and delivery of traffic at certain Army base piers in Norfolk, Va., or to pay the Army an allowance therefor, and to pay reparation on past shipments handled by it over those piers. See 263 I.C.C. 303, 304 (1945). But when the final report of the Commission on reargument was issued,

two years later, the war was over and it appeared that the issue of future relief had become moot, "so that the purpose of this proceeding now is for reparation only" (269 I.C.C. 141, 147 (1947)). In this Court's cited opinion, those proceedings were characterized thus: "• • • the root of the controversy concerns the payment of money damages • • •." (337 U.S. at 443) It is obvious that the facts of the instant case find a direct parallel in the proceedings before the Court in *United States v. Interstate Commerce Commn., supra,* and are governed thereby. This was recognized by the trial judge, who stated:

> "On the authority of United States v. Interstate Commerce Commission, 1949, 337 U.S. 426, 69 S.Ct. 1410, 93 L.Ed. 1451, the request of plaintiff for a 3-judge court was denied • • •." (128 F. Supp. 919, 921)

Indeed this was the view at that time of petitioner, which, at page 5 of its first petition for certiorari in No. 85, Oct. Term, 1955, stated:

> "For a one judge determination rather than a three judge District Court, and appeal to the Court of Appeals rather than this Court, see U. S. vs. I.C.C., 337 U.S. 426, 441."

Therefore, we respectfully submit that the trial court, the Court of Appeals and the Supreme Court all properly concluded that the single-judge District Court had jurisdiction to hear and decide the case. If, perchance, it be true that a three-judge court should have heard and decided the complaint, which we deny for reasons already set forth, petitioner is no better off because there is no question but that the District Court had general jurisdiction, and whether the procedure followed was correct in all particulars is now immaterial. Any right which petitioner may have had with

respect to the number of judges was waived by its failure to make timely objection and in acquiescing in the procedure actually followed.

While we agree that absolute want of jurisdiction of the subject-matter by the District Court may not be waived or conferred by consent (Petitioner's Memo, p. 28a), nevertheless where—as here—the court has general jurisdiction of the subject-matter, jurisdiction of the particular case will be waived by failure to take timely and specific objections and submission to the jurisdiction raises an estoppel to deny such jurisdiction. 21 C.J.S., *Courts* § 109, p. 166, states the rule as follows:

> "• • • Where the court has general jurisdiction of the subject matter, a lack of jurisdiction of the particular case, as dependent upon the existence of particular facts may be waived," citing, among other cases,
>
> *United States v. Ellison*, 74 F.2d 864, 869 (4th Cir. 1935), *cert. denied*, 295 U.S. 750.

In the interest of brevity, we refer to, and adopt as a part of this reply, the reply of Southern Pacific Company to the motion, etc., in No. 85, Oct. Term, 1955.

III. Petitioner has no standing to attack jurisdiction of Court of Appeals or District Court.

Petitioner, not being an appellant and raising no question as to the jurisdiction of the District Court or Court of Appeals until after denial by this Court of its first petition for certiorari in No. 85, Oct. Term, 1955, has no standing to attack the jurisdiction of the Court of Appeals, or to thus directly or indirectly challenge the validity of the single-judge decision of the District Court, which it claims is void, but actually seeks to sustain. The District Court did have general jurisdiction under 28 U.S.C. § 1336, leaving only the question of fact as to whether one or three judges should

hear the complaint. This was and is a procedural question, which was resolved against petitioner by the trial court, and any irregularity in this respect could only be raised at the outset by mandamus or appeal, or it will be treated as waived. It is a rule of universal application that parties not appealing are not entitled to question a ruling of the lower court.

Le Tulle v. Scofield, 308 U.S. 415, 421-22 (1940), and cases cited in footnote 9, p. 422;

Peoria & P. U. Ry. v. United States, 263 U.S. 528, 536 (1924);

Morley Constr. Co. v. Maryland Cas. Co., 300 U.S. 185, 191-92 (1937);

3 Am. Jur., *Appeal & Error* §§ 865-66, pp. 402-03.

In its points and authorities, page 28a, petitioner states:

> "Furthermore the United States, the only necessary party under the statute, has not endeavored to appeal from the decision of the District Court, either to the United States Supreme Court or to the Court of Appeals."

The significance of that statement is not apparent to us because 28 U.S.C. § 2323 expressly provides for intervention "as of right" by the Interstate Commerce Commission "and any party or parties in interest to the proceeding before the Commission * * * who may prosecute, defend, or continue said action or proceeding unaffected by the action or non-action of the Attorney General therein."

CONCLUSION

The sole foundation for this second petition is the repudiation by petitioner of a position which it had heretofore urged upon the Commission, the trial court, the Court of

Appeals and upon the Supreme Court when this case was first brought before it. There it no substance to the claim which petitioner seeks to raise, for clearly both the trial court and the Court of Appeals had statutory jurisdiction. For these and other reasons heretofore presented, the petition should be denied.

Dated at San Francisco, Calif., this 1st day of May, 1956.

Respectfully submitted,

JAMES C. DEZENDORF
GEORGE B. CAMPBELL
JAMES E. LYONS
CHARLES W. BURKETT, JR.

Counsel for Respondent,
Southern Pacific
Company.

Certificate of Service

I, JAMES E. LYONS, one of counsel for respondent Southern Pacific Company, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1st day of May, 1956, I served copies of the foregoing brief on the parties to this proceeding, as follows:

1. On petitioner, by mailing copies in duly addressed envelopes, with air mail postage fully prepaid, to its attorneys of record, as follows:

George L. Quinn, Jr., Esq.,
815 - 15th Street, N.W.,
Washington 5, D.C.

Irving Rand, Esq., and
Donald A. Schafer, Esq.,
Public Service Building,
Portland 4, Oregon.

2. On the United States, by mailing a copy in a duly addressed envelope, with air mail postage thereon fully prepaid, to

The Solicitor General,
Department of Justice,
Washington 25, D.C.

3. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope, with air mail postage thereon fully prepaid, to

Robert Ginnane, Esq.,
Chief Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

JAMES E. LYONS

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OCTOBER TERM, 1955

No. 822

THE MARTIN BROTHERS BOX COMPANY, A CORPORATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND SOUTHERN PACIFIC COMPANY, A CORPORATION, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT INTERSTATE COMMERCE COMMISSION IN OPPOSITION

QUESTION PRESENTED

Whether a decision of a District Court, which held only that the Interstate Commerce Commission erred in denying a claim for reparations, is appealable to the appropriate Court of Appeals or directly to this Court.

STATEMENT

This is a repetition of the contention of petitioner, Martin Brothers Box Company, that the

Court of Appeals for the Ninth Circuit lacked jurisdiction over an appeal from the judgment of the District Court for the District of Oregon, consisting of a single judge, which was adverse to petitioner, 128 F. Supp. 919.

In No. 85, October Term, 1955, Martin petitioned this Court for a writ of certiorari to review the decision of the Court of Appeals (219 F. 2d 811), which petition was denied on October 10, 1955, 350 U. S. 823. On November 3, 1955, he filed a motion with this Court requesting that the order of October 10, 1955, denying writ of certiorari, be set aside. The motion was denied on December 5, 1955 (No. 85, October Term, 1955). Simultaneously with the filing of the motion in this Court, petitioner filed with the Court of Appeals, Ninth Circuit, a motion to vacate its judgment and to dismiss the appeals of the Commission and the Southern Pacific to that Court on the ground that it lacked jurisdiction to entertain the appeal from the judgment of the District Court.

The motions filed in the Court of Appeals and in this Court were predicated on the contention that the complaint filed in the District Court should have been heard and determined by a statutory three-judge court, instead of a one-judge District Court. Hence, it is contended the Court of Appeals lacked jurisdiction to hear the

appeal under Section 1253 of Title 28 U. S. C.[1] The instant petition is based on the same contentions as those advanced and rejected in the two aforementioned motions.

ARGUMENT

1. Petitioner would have this Court believe, as revealed by its "Question Presented" (Petition, p. 2) that the decision and judgment of the District Court, setting aside the order of the Commission, was concerned with issues "other than the payment of money." This statement conveys an erroneous impression. A review of the proceedings before the Commission and the courts below clearly shows that the sole relief sought by the petitioner was an award of reparation.

Moreover, the issues as stated by the Examiner at the beginning of the hearing before the Commission was as follows (R. 130–131):

> Exam. HANSON. By complaint filed October 14, 1947, Complainant alleges that during the period January 1 to September 30, 1947, Defendant failed to provide Complainant with transportation from Oak-

[1] Section 1253, Title 28 U. S. C., provides that:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 926."

land, Oregon, upon reasonable request therefor, and caused undue prejudice to Complainant by failing to provide car service from Complainant's plant in Oakland in the same proportion to actual requirements as was provided other shippers on Defendant's line. An award of damages is requested.

Is that a correct summary of the complaint?

Mr. QUINN. I think it is, yes.

Exam. HANSON. Complainants may proceed.

The proposed report of the Examiner (R. 84–106) was concerned only with reparations and not with relief for the future. No exception was taken to the Examiner's report because of that circumstance. The report of the Commission, by Division 3, dealt only with reparation.

In its brief filed in the Court of Appeals from the decision of the District Court (No. 14077, dated May 12, 1954), petitioner stated, at page 4, that:

> * * * During 1947, the difficulties in obtaining cars became so aggravated that on October 14, 1947, Martin filed with the Interstate Commerce Commission a complaint demanding, among other things, that Southern Pacific Company be required by order of the Commission to furnish to Martin adequate transportation. *By the time the matter came on to be heard before an Examiner Martin's Oakland*

> *plant was no longer being deprived of necessary cars by Southern Pacific. There remained the question of reparations for the damages caused during the complaint period, from January 1, 1947, to September 30, 1947, by the failure of Southern Pacific Company to furnish adequate transportation.* * * * [Emphasis added.]

As shown from the above, although petitioner's complaint in the Commission proceeding sought an order "commanding the defendant to provide complainant with adequate car service" in addition to reparations (R. 80–81), all relief sought was abandoned except that for reparation covering alleged failure of the Southern Pacific to deliver cars during the period from January 1, to September 30, 1947.

2. It is clear that the Court of Appeals had jurisdiction to review the judgment of the District Court, since the case involved only the grant or denial of reparations by the Commission. In *United States* v. *Interstate Commerce Commission,* 337 U. S. 426, 443, this Court held the judicial review of a Commission order denying reparation shall be in a single-judge District Court and that an appeal from the judgment of such a court should be taken to the appropriate Court of Appeals, rather than to this Court. Thereafter, jurisdiction to review a similar judgment of a one-judge District Court was exercised by the Court of Appeals for the District of Co-

lumbia in *United States* v. *Interstate Commerce Commission*, 198 F. 2d 958 (certiorari denied 344 U. S. 893). It is clear, therefore, that the Court of Appeals for the Ninth Circuit had jurisdiction to hear and determine the appeal in the instant case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT W. GINNANE,
General Counsel,

SAMUEL R. HOWELL,
Associate General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

MAY 1956.

CERTIFICATE OF SERVICE

I, Samuel R. Howell, one of counsel for respondent Interstate Commerce Commission, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of May 1956, I served copies of the foregoing brief on the parties to this proceeding as follows:

1. On petitioner, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to its attorneys of record, as follows:

George L. Quinn, Jr., Esq.
815 15th Street, N. W.
Washington 5, D. C.

and with air-mail postage prepaid, to:

Irving Rand, Esq., and
Donald A. Schafer, Esq.
Public Service Building
Portland 4, Oregon

2. On the Southern Pacific Company by mailing copies in duly addressed envelope, with air-mail postage prepaid, to its attorneys of record, as follows:

James E. Lyons, Esq.
Charles W. Burkett, Jr., Esq.
65 Market Street
San Francisco 5, California

3. On the United States of America, by mailing copies in duly addressed envelope with first-class postage prepaid, to:

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

SAMUEL R. HOWELL.

U. S. GOVERNMENT PRINTING OFFICE: 1956